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In the

Supreme Court of the United States

OCTOBER TERM, 1969

MICHAEL ZAKUTANSKY and
ARTHUR M. JOHNSTON,

Petitioners,

vs.

UNITED STATES OF AMERICA and RICHARD C. ANDERSEN, Special Agent, Internal Revenue Service.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners ask that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment of the United States District Court for the Northern District of Indiana, which ordered that work papers in the possession of a taxpayer be turned over to a Special Agent of the Internal Revenue Service who was engaged in a criminal investigation of the taxpayer.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A) has not yet been reported; the District Court Opinion is reported at 278 F.Supp. 682.

JURISDICTION

The Opinion of the Court of Appeals was filed August 22, 1968; the Petition for Rehearing was denied September 17, 1968; the Mandate was stayed thirty days on September 20, 1968, pending application for a Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1254(1).

QUESTIONS PRESENTED

1. Where an accountant is confronted by conflicting demands of his client and a Special Agent of the Internal Revenue Service for papers he would customarily return to the taxpayer, is he under "a moral, if not legal, obligation to provide them to the government?"

2. Where a summons is served pursuant to Section 7602 of the Internal Revenue Code is the recipient obliged to hold and set such material aside indefinitely until expressly notified by the Internal Revenue Service that the summons has been abandoned?

The District Court announced its answers thus:

> "The 'rightful possession' test advanced by some of the courts does not apply here because at the time the papers were transferred the transferor was under a moral, if not legal, obligation to provide them to the government."

The Court of Appeals for the Seventh Circuit adopted the opinion of the District Court as its own.

STATUTES INVOLVED

The following Statutes are involved herein:

1. Section 7602, Title 26, United States Code:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been

made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

2. Section 7604, Title 26, United States Code:

"(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

"* * *"

STATEMENT OF THE CASE

In May 1966 a Special Agent of the Internal Revenue Service was engaged in an investigation covering the tax affairs of Arthur Johnston for the years 1961 through 1965. His returns had been prepared by Michael Zakutansky, a certified public accountant. The taxpayer gave him some adding machine tapes previously prepared upon which the accountant made some notations. Zakutansky also made notations of financial information on columnar sheets at the oral instructions of the taxpayer. It is these tapes and notations which the Special Agent of the Internal Revenue Service sought.

The accountant did not consider such material to be his. Work papers which were a product of his own audits, in the custom of his practice, he would customarily retain. Miscellaneous notations of the type in issue he would customarily return. It was undisputed that over the years he had in fact returned other material to the taxpayer from time to time as such material had either been needed or requested by him.

On May 11, 1966, two Special Agents of the Internal Revenue Service called on Zakutansky at his office and served a summons upon him which referred to the investigation of the taxpayer Johnston and demanded the following:

"1. Any and all records of the taxpayer furnished you for use in preparing income tax returns and related statements.

2. Your accounting worksheets, workpapers, retained copies of tax returns, and memoranda records used in preparing the tax returns for the above.

3. Your retained copy of any financial statements prepared for the above."

No material was examined then, or subsequently.

The Special Agent admitted that after this first conference with the accountant he considered it necessary to consult government counsel about the summons.

The accountant appeared with his personal attorney on the return date of the first summons, May 23, 1966, and refused to turn over any papers. This summons was abandoned by the Special Agent and an abbreviated second summons issued on June 28, 1966. The Agent testified that on advice of government counsel he had deleted the reference to "taxpayer's papers". On the return date of the second summons the accountant appeared with his attorney and once again declined to deliver the material to the Special Agent.

An error had been made in dating this summons and on July 20, 1966, the Special Agent phoned the attorney for the accountant to advise him of the error.

On July 25, 1966, the Special Agent issued a third summons. The accountant advised that the material had been given to the taxpayer several days before.

The Special Agent did nothing for several months, until an attorney called and advised the Special Agent that he represented the *taxpayer*. He proposed to the Special Agent that he proceed with the interrogation of the accountant on a formal question and answer statement without the papers, since, in his opinion, these papers properly belonged to the client and were within the protection of the Fifth Amendment. *The Special Agent honored the request and set a date for the appearance of the accountant at the office of the Internal Revenue Service without the papers.* A few days before the accountant was to appear, the Special Agent advised counsel that it had been determined by the Department of Justice that the accountant's statement not be taken

and they now preferred to focus on the papers held by the taxpayer.

On December 30, 1966, the Special Agent served a summons *on the taxpayer* and demanded that he deliver all the material returned to him, which request was refused.

The petition in the District Court followed.

Following notice of appeal, the respondents asked that the order of the District Court be stayed pending the appeal. In opposition the United States asked that the appeal be accelerated. Although the Court of Appeals granted the stay, it ordered that the parties submit an agreed order expediting the matter. These appear in the Appendix.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

1. There is a conflict between the Courts of Appeal for the Seventh Circuit and the Ninth Circuit on the application of the Fifth Amendment in cases of summonses issued by a Special Agent pursuant to Section 7602 of the Internal Revenue Code.

2. The Court of Appeals for the Seventh Circuit has emphasized the novel theory of the District Court not heretofore pronounced by any other, that a "moral, if not legal" consideration requires a professional to prefer the Internal Revenue Service to his client.

3. Although the District Court acknowledged in its opinion that at the time the District Court action was begun the papers were in the hands of the taxpayer, it issued no order upon the taxpayer but directed the

accountant to get the papers from him, an order patently improper and one the Court of Appeals declined to rule upon.

THE CONFLICT IN CIRCUITS

The government argued two positions in the Ninth Circuit in the case of *United States* v. *Cohen,* 388 F.2d 464:

(a) That the privilege against self-incrimination applies only to papers which are held by the claimant free of any duty to surrender them to another.

(b) That the request by the accountant for the return of papers rendered the taxpayer's possession "wrongful" and therefore insufficient to support a claim of privilege.

To these arguments, the Court of Appeals for the Ninth Circuit said:

As to the first contention (p. 468):

> "As the government recognizes, the rule it suggests would make ownership of subpoenaed documents virtually essential to a claim of privilege, for ordinarily only the owner will be able to assert a right to possession superior to all others. But it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit."

As to the second (pp. 469-70):

> "There is authority that possession of incriminating documents is sufficient to support the privilege even though the possession is wrongfully acquired and the owner has requested that the documents be re-

turned. The logic of the privilege supports this view, for, as we have said, the exercise of governmental power which the privilege was intended to bar occurs whenever, without more, a person is compelled to identify, authenticate, and produce documents which may tend to incriminate him.

"In any event, Cohen's possession cannot fairly be characterized as wrongful. Berke testified without contradiction that he considered all papers relating to his clients' affairs to be theirs to command, and that it had been his invariable practice to deliver such papers to the client whenever requested."

The United States attempted to distinguish the conflicting opinion of the Court of Appeals for the Ninth Circuit in its brief filed below but, other than language adopting the opinion of the District Court as its own, the Court of Appeals for the Seventh Circuit declined to comment. Nonetheless the conflict is patent, and the government appears to have realized this.

In its brief filed below in the instant case, the government asserted that the term "wrongful" as used in the Ninth Circuit comprehended a trespassful taking, such as larceny from the Internal Revenue Service. This extension of the term is an absurdity never intended by the court in *Cohen*. However, the court in the Seventh Circuit appears to have been pressed to the opposite extreme, having found that the term "wrongful" includes merely a lack of cooperation with a Special Agent bent on prosecution, which the court calls "immoral, if not illegal". One might be reminded that this court has recently declared that Congress, and not the Internal Revenue Service, has authority to declare what is immoral in the collection of revenue. *Tellier* v. *C.I.R.*, 383 U.S. 573.

THE "INDEFINITE VIABILITY" THEORY OF GOVERNMENT PROCESS

The government asserted without citation that once any summons issues by the Internal Revenue Service, although it may be replaced by another or otherwise aborted, it continues viable indefinitely. To the contrary is the case of *Bauer* v. *Orser,* arising in the District Court, North Dakota, 258 F.Supp. 338, a 1966 case. Here, an accountant was served on January 22, 1965, with a summons which asked for work papers. The demand was refused. The enforcement petition was filed eight months later on October 4, 1965. On the date of the hearing, March 24, 1966, the court was advised that the material had been delivered in November or December 1965!

It is true the court found preliminarily that the employment of the accountant comprehended such a return, an important fact which the District Court in the instant case did not find, but the case clearly holds that the mere service of a commissioner's summons does not oblige an accountant to sequester material indefinitely. The United States did not appeal this case. In the instant case the course of conduct of the Special Agent belies the viability idea, apart from the fact that there were no proceedings pending when the accountant here returned the tapes and papers.

CONCLUSION

A reading of the District Court's opinion suggests that the court found its way through a welter of uncertainty not by following the admonition of the Supreme Court of the United States concerning the application of the Fifth Amendment privilege, but rather by a sparing reference to a number of cases where the issue turned on other points.

In its opinion the District Court below refers to numerous authorities and finds none of them controlling, and adds, "Other questions remain unsettled by the varying decisions of the federal courts." (App. p. 4a) In argument thereafter, the District Judge expressed serious concern about the legal problems raised in the matter. It is most unfortunate that under these circumstances we are "short-changed" by the failure of the reviewing court to address itself to the uncertainty implicit in the decision, itself, and the conflict with the Ninth Circuit. It may be the court was hurried by the request of the government, but the problems inherent in the extension of statutory process have become promiscuous and are too important for summary consideration.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16790 SEPTEMBER TERM, 1967 APRIL SESSION, 1968

UNITED STATES OF AMERICA and RICHARD C. ANDERSON, Special Agent, Internal Revenue Service, *Petitioners-Appellees,*

v.

MICHAEL ZATKUTANSKY and ARTHUR M. JOHNSTON also known as ARTHUR M. JOHNSON, *Respondents-Appellants.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

AUGUST 22, 1968

Before SCHNACKENBERG, KILEY and FAIRCHILD, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Michael Zakutansky, a certified public accountant, and Arthur M. Johnston, also known as Arthur M. Johnson, "taxpayer", appeal from the district court's order directing Zakutansky to appear before a special agent of the Internal Revenue Service and deliver papers and give testimony relating to the tax liability of taxpayer and his wife.

The court's order provided that:

> "The petitioners having filed their petition to show cause against the respondents, and a rule having

issued and a hearing thereon having been held and the Court having heard and examined the evidence, argument of counsel and briefs filed by the parties, and having filed its findings of fact and conclusions of law,

It Is Now Ordered And Decreed that the respondent Michael Zakutansky appear before a special agent of the Internal Revenue Service at such time and place as such agent may specify and deliver the papers that have been marked 1 through 79 to said special agent and give evidence pertaining to the tax liability of Arthur and Sue Johnston for the years 1960 through 1965."

In support of its order the court issued the following memorandum:

"This action was commenced by the filing of a petition to enforce an Internal Revenue summons against the two named defendants [respondents here]. Jurisdiction of the court is based on Title 26, U.S.C. Sections 7602 and 7604(a)[1] and is unchallenged by

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[1] Title 26 U.S.C. Section 7602 provides:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of a transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the secretary or his delegate is authorized (1) to examine any books, papers, records or other data which may be relevant or material to such inquiry.

Title 26 U.S.. Section 7604(a) provides:

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records or other data, the United States District Court for the district in which such person resides, or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records or other data.

the parties to the proceedings. The summons sought to be enforced against the defendants, seeks the production of *accountant's work papers used by defendant Zakutansky in preparing the income tax returns* of Mr. Johnston for the years 1960 through 1965.[2] At the time the action was commenced, respondent Johnston, the taxpayer, had possession of the papers in question. His attorney produced these papers in a sealed envelope for the Court's examination in camera. It is the taxpayer's contention that the papers in question are protected by the Fifth Amendment guarantee against self-incrimination. The government contends that the papers are the property of the accountant Zakutansky and are therefore not protected by privilege.

Briefly the facts are as follows: The respondent Zakutansky is a certified public accountant who prepared the respondent Johnston's tax returns for the years 1960 through 1965. On May 11, 1966 special agents of the Internal Revenue Services visited the offices of Mr. Zakutansky to inquire about Mr. Johnston's tax returns. Mr. Zakutansky told the agents that he had work papers belonging to him which he had used in preparing Mr. Johnston's returns. On May 23, 1966 Mr. Zakutansky appeared in response to a subpoena requiring testimony and the papers. Mr. Zakutansky's attorney requested time in which to determine his client's responsibilities and Mr. Zakutansky refused to surrender the papers. On June 28, 1966 a second subpoena was issued requiring Mr. Zakutansky to appear and produce the papers on July 8, 1966. Mr. Zakutansky appeared in the company of an attorney, but refused to testify or produce the papers because the subpoena was erroneously dated July 28, 1966 instead of June 28, 1966. On July 21, or 22 of 1966, Mr. Zakutansky turned the papers over to the taxpayer Mr. Johnston.

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[2] Italics supplied.

Subsequently, summonses were served on Mr. Zakutansky and Mr. Johnston for the production of the papers. Mr. Zakutansky was unable to comply because he no longer had the papers, and Mr. Johnston refused to comply under a claim of the Fifth Amendment privilege. Mr. Johnston did produce, however, pencil copies of the tax returns compiled by Mr. Zakutansky.

This Court has examined the numerous authorities cited by the parties and finds none of them to be controlling on the exact question before us. There are certain general principles, however, which most, if not all, authorities agree upon. First, as a general rule accountant work papers are the property of the accountant unless shown to the contrary. *Falsone* v. *United States,* 205 F. 2d 734 (5th Cir. 1953); *Sale* v. *United States,* 228 F. 2d 682 (8th Cir. 1956) *cert. den.* 350 U.S. 1006 (1956); *United States* v. *Boccuto,* 175 F. Supp. 886 (D.N.J. 1959) App. dism. 274 F. 2d 860 (3rd Cir. 1960) *Anno.* 90 A.L.R. 2nd 784 (1963). Secondly, if the papers had remained in the possession of the accountant, he would have been required to produce them. *Falsone* v. *United States, supra; Sale* v. *United States,* 228 F. 2d 682, *supra.* Third, if the taxpayer held the papers as his undisputed personal property, or if they were in his rightful and indefinite possession, they would have been protected by his privilege against self-incrimination. *United States* v. *Cohen,* 250 F. Supp. 472 (D. Neb. 1965); See *United States* v. *Judson,* 322 F. 2d 460 (9th Cir. 1963); *Colton* v. *United States,* 306 F. 2d 633 (2d Cir. 1962) *cert. den.* 371 U.S. 1511 (1963); *Application of House,* 144 F. Supp. 95 (N.D.Cal. 1956). Other questions remain unsettled by the varying decisions of the federal courts. Some courts have held that the taxpayer's attorney in possession of accountant's work papers has no right to assert his client's privilege against self-incrimination. *Boushor* v. *United States,* 316 F. 2d 451 (8th Cir. 1963);

In re Fahey, 300 F. 2d 383 (6th Cir. 1961); *United States* v. *Buccuto*, 175 F. Supp. 886 (D.N.J. 1959). App. dism. 274 F. 2d 860 (3rd Cir. 1960). *Contra. United States* v. *Judson*, 322 F. 2d 460 (9th Cir. 1963); *Colton* v. *United States*, 306 F. 2d 633 (2d Cir. 1962), *cert. den.* 371 U.S. 951 (1963); *Application of House*, 144 F. Supp. 95 (N.D.Cal. 1956).

Based on the above cases, the court determined that respondent Johnston would be entitled to withhold the papers under a claim of privilege if he owned them or rightfully held them in his personal capacity for an indefinite period. The court further determined that if the papers were accountant's work papers, they originally belonged to the accountant. The taxpayer contended that these were not accountant's work papers, because there was no certified public audit which required the accountant to keep work papers. Mr. Zakutansky's work was confined to the preparation of the taxpayer's returns and the papers in question consisted of his notes and adding machine tapes used in the preparation of the returns. Mr. Zakutansky testified that he personally did not consider these to be work papers, but he had previously told the special agents that they were.

The court determined that they were work papers. In *United States* v. *Pizzo*, 260 F. Supp. 216 (S.D.N.Y. 1966), where the accountant's work was confined to the preparation of the taxpayer's returns, the court found, on the basis of the accountant's testimony, that '"work papers" means any papers "where you have records recorded on it and the common form of work papers are the columnar form of work papers". Memorandum sheets could be work papers and "it might be almost anything from the taxpayer's books showing income or expenditures"'. 260 F. Supp. 216, 218 (S.D.N.Y. 1966). Mr. Zakutansky's papers perfectly fit this description. They were columnar work papers and adding machine tapes showing the taxpayer's income and expenditures. This court can

not find that legal character of papers depends upon the type of paper used. The respondents also contend that these could not be work papers because they were not the type of papers kept by an accountant to support a certified public audit. That these papers were not used to support a public audit is admitted, but neither were those in *Pizzo, supra.* Furthermore, an accountant or anyone else preparing an income tax return is asked to sign it as evidence that the information contained is true to the best of his knowledge. The papers sought here were of a type which should be kept to support that assertion. The court therefore finds that those papers identified by Mr. Zakutansky as having been prepared by him are 'work papers' within the meaning of the case law.

Although these papers are work papers and originally belonged to Mr. Zakutansky, he may have relinquished his claim to them in good faith thereby giving the taxpayer rightful and indefinite possession of them. (See *United States* v. *Cohen,* 250 F. Supp. 472 (D.Nev. 1965). *Application of House,* 144 F. Supp. (N.D.Cal. 1956). That is what the taxpayer contends happened here, but the court finds otherwise. Although there are no controlling cases, several courts have indicated that the court is not bound by the assertions of the taxpayer, accountant, or both. *Deck* v. *United States,* 339 F. 2d 739 (D.C. Cir. 1965), *cert. den.* 379 U.S. 967 (1965); *Bouschor* v. *United States,* 316 F. 2d 451 (8th Cir. 1963); *United States* v. *Boccuto, supra.* In *Boccuto,* the court relying on *Sale* v. *United States,* 228 F. 2d 682 (8th Cir. 1956) held that work papers turned over to the taxpayer's attorney remained the accountant's propperty despite an affidavit to the contrary. In *Bouschor,* where the papers were held by the taxpayer's attorney, the court said at 316 F. 2d 451, 459 (8th Cir. 1963):

> '(T)hat Bouschor knew that the appearance of a special agent indicated that O'Brien's re-

> turns were being investigated for fraud, that it was Bouschor who as he pleaded, "directed said client to cause to be turned over to him all work papers" and that in consequence thereof the papers were delivered. This, although proper and necessary or at least desirable for Bouschor's representation of his client, cannot in itself serve to thwart investigation by the Internal Revenue Service.'

In *Deck* v. *United States,* 339 F. 2d 739, 740 (D.C. Cir. 1965) *cert. den.* 379 U.S. 967 (1965), the court stressed:

> 'It was not until after the tax investigation began that Kless showed any interest in work papers then in the possession of Philips; until Kless requested them they were apparently regarded by all concerned as his property.'

The court recognizes that each of these cases has distinguishable features. In *Bouschor* and *Boccuto* the papers were held by the taxpayer's attorney. In *Deck,* the accountant asked for the papers return. They all indicate, however, that the court is not bound by either the taxpayer's or accountant's assertions concerning the papers sought.

The facts here convince the Court that the papers were and are the property of the accountant. They were in his possession until after he had been served with two subpoenas by the Internal Revenue Service. When first asked about the papers he stated that they belonged to him. Not until an apparent error in a subpoena provided an excuse did the accountant turn them over to the taxpayer. He had twice been called to produce them, and would have been obligated to do so had they remained in his possession. His later assertions that he never had any interest in the papers are unconvicing. Just as in *Deck* and *Bouschor* where the courts found the accountant's previously uninterrupted possession of the papers an important factor in determining their ownership,

so does this court. It indicates that the transfer of the papers was a mere attempt to thwart the government investigation. As in *Boccuto,* the court finds the accountant's latest disclaimers of interest to be unconvincing in view of the circumstances of the transfer.

The 'rightful possession' test advanced by some of the courts does not apply here because at the time the papers were transferred the transferor was under a moral, if not legal, obligation to provide them to the government. Both Mr. Zakutansky and Mr. Johnston were aware of this obligation and its possible consequences. Their natural desire to protect themselves or their clients is not sufficient to change the character of the papers and thereby defeat a legitimate government investigation.

The court therefore finds that the papers were not in the indefinite and rightful possession of the taxpayer and those papers identified as being prepared by Mr. Zakutansky should be held for examination by the petitioners."

This finding is basic to the decision of this case. It means that at the critical time, when the subpoena of the Internal Revenue Service was served on Zakutansky, the papers being sought were not in the unlimited and rightful possession of the taxpayer. This fact is inescapable. Moreover, it is significant to the extent that it is dispositive of the issues raised on this appeal. Therefore the order from which this appeal was taken is hereby affirmed.

ORDER AFFIRMED.

APPENDIX B

UNITED STATES of America et al.,
Appellants,

v.

Carl COHEN, Appellee.
No. 20921.
United States Court of Appeals
Ninth Circuit.

Dec. 19, 1967.

Browning, Circuit Judge:

Samuel Berke, an accountant with offices in Beverly Hills, California, performed accounting and general business services for Carl Cohen of Las Vegas, Nevada. On July 8, 1964, Berke had in his possession work papers which he had compiled from data supplied orally and in writing by Cohen, as well as copies of correspondence between the two men and other documents pertaining to these services. On that day, July 8, 1964, Special Agents C. L. Beason and J. R. Chamberlain of the Internal Revenue Service called on Cohen in Las Vegas and asked to see Cohen's records pertaining to his tax liability for the years 1958 through 1963. Cohen told the agents that Berke had them. The following day Cohen went to Beverly Hills and requested and obtained the records from Berke. Four days later Beason demanded the records from Berke, and was informed that Cohen had picked them up. Beason requested Berke to ask Cohen for their return. Berke complied. Cohen declined to return the papers.

On September 29, 1964, Beason served Cohen with a summons, issued under section 7602, I.R.C.1954, 26 U.S.C. § 7602 (1964), to appear before Beason on October 12, 1964, and produce the papers which Cohen had obtained

from Berke on July 9.[1] Cohen appeared but declined to produce the documents described in the summons on the ground that to do so might tend to incriminate him.

Beason filed a petition in the district court for enforcement of the summons pursuant to section 7604(a), I.R.C. 1954, 26 U.S.C. § 7604(a) (1964). After an evidentiary hearing, the district court quashed the summons. *United States* v. *Cohen,* 250 F.Supp. 472 (D.Nev.1965). The government appeals. We affirm.

[1] The Fifth Amendment commands that "No person * * * shall be compelled * * * to be a witness against himself." It is obvious that the government seeks to compel Cohen to produce the described documents without regard to his wishes. It has been the law for at least eighty years that compelled production of documents falls within the ambit of the privilege.[2] It is conceded that the documents demanded here might be used by the government against Cohen in a future criminal proceeding.[3] Moreover, since the documents themselves are in-

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[1] The summons described the papers as follows:

1. All accounting work papers, statements, records, schedules, abstracts, analyses, and compilations prepared by Samuel Berke, C.P.A., or by members of his firm relating to your income tax liabilities for the years 1958 through 1963, which you obtained from Mr. Berke on July 9, 1964.
2. All correspondence files of Samuel Berke relating to accounting and general business services performed by his firm for you during the years 1958 to the present time, which you obtained from Mr. Berke on July 9, 1964.

[2] *Boyd* v. *United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

[3] The privilege has not been limited to documents prepared by the claimant himself or containing his own incriminating statements of fact. *Wilson* v. *United States,* 221 U.S. 361, 378, 31 S.Ct. 538, 55 L.Ed. 771 (1911); Maguire, Evidence of Guilt § 2.04, at 22 (1959); Mansfield, The Albertson Case, Sup.Ct.Rev. 103, 126-28 (1966).

criminating, their very production pursuant to the description in the summons would constitute an incriminating admission of their identity and authenticity.[4] Clearly, recognition of the privilege in this case would serve most of the purposes of the privilege, recently restated in *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed. 2d 678 (1964):

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation,

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[3] (Continued)

Professor Mansfield raises the question of whether the emphasis on testimonial or communicative use in *Schmerber* v. *State of California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (see also *Warden* v. *Hayden,* 387 U.S. 294, 302-303, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *United States* v. *Wade,* 388 U.S. 218, 222, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); and *Gilbert* v. *State of California,* 388 U.S. 263, 266-267, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967)), may foreshadow change in this area. But even, if the privilege were to be restricted to papers containing verbalizations by the claimant of his own state of mind, or were to be held inapplicable even to these on the ground that the statements reflected in such papers were not compelled, the privilege would still seem to be available for the second aspect mentioned in the text, namely, the identification and verification of the papers by the claimant which is necessarily implicit in their production under the conpulsion of the subpoena. See note 4. This is apparently what the Court had in mind when it stated in *Schmerber:* "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, *and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers*" 384 U.S. at 763-764, 86 S.Ct. at 1832. (Emphasis added.)

[4] *Curcio* v. *United States,* 354 U.S. 118, 125, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957); 8 Wigmore, Evidence § 2264, at 379-80 (McNaughton rev. 1961); Maguire, Evidence of Guilt § 2.04, at 22 n. 3 (1959). See also *United States* v. *White,* 322 U.S. 694, 698, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944).

perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," * * * our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," * * * our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection for the innocent."[5]

The government nonetheless contends that the privilege should not apply in this case, for two basic reasons.

I

[2] The substance of the government's first contention is that the privilege against self-incrimination applies only to papers which are held by the claimant free of any duty to surrender them to another. Since, according to the government, Cohen held the papers subject to a duty to surrender them to Berke, Cohen could not claim the privilege.[6]

[3] The government rests this contention principally upon *United States* v. *White*, 322 U.S. 694, 64 S.Ct. 1248,

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[5] Of course, there is nothing in this case that arouses "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses."

[6] The district court found that Cohen held the documents "in his rightful and indefinite possession in a purely personal capacity"; and that this was "sufficient to entitle him to invoke the privilege against self-incrimination; and there was "no need to determine the ownership of the work papers." 250 F.Supp. at 475. The government contends that at the very least the case should be remanded for a determination of the issue of title.

88 L.Ed. 1542 (1944) in which the Court held that an officer of a labor union could not avail himself of the privilege to avoid producing his union's records because they might tend to incriminate him; and *Wilson* v. *United States,* 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911), in which the Court held that a corporate officer could not claim the privilege to avoid the production of his corporation's records. The government reads these cases as denying the protection of the privilege to the officer-claimant because he held the records subject to an obligation to relinquish them to the organization which owned them. We read them rather as an extension of the rule that the privilege against self-incrimination is available to protect only the personal interests of natural persons and not group interests embodied in impersonal organizations.[7] Custodians of organizational records may not frustrate the public policy underlying the organization's lack of privilege by withholding the organization's official records from examination by public authorities under a claim of personal privilege. This rationale is obviously inapplicable to the present case.[8]

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[7] Thus, in *United States* v. *White,* 322 U.S. at 700, 64 S.Ct. at 1252: "The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible." See also *Wilson* v. *United States,* 211 U.S. at 380-382, 31 S.Ct. 538; *United States* v. *Silverstein,* 314 F.2d 789, 791 (2d Cir. 1963).

[8] The distinction between *White* and *Wilson* and the present case may be stated another way. Return of the *White* and *Wilson* papers to the owning principal would have automatically turned the papers over to the govern-

[4, 5] As the government recognizes, the rule it suggests would make ownership of subpoenaed documents virtually essential to a claim of privilege, for ordinarily only the owner will be able to assert a right to possession superior to all others. But it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit. The "cruel trilemma" of perjury, contempt, of self-incrimination, of which the Court spoke in *Murphy* v. *Waterfront Comm'n*, faces the individual whenever the government seeks to compel him to produce papers in his possession, for he must then either falsify, accept punishment for contempt, or yield. Lack of title does not free him from the choice.[9]

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[8] (Continued)
ment, for the government clearly had a right to the papers free of any claim of privilege when the papers were in the "hands" of the corporation or the union. The Court held that the officers could not abrogate the government's right. But no such right is present here; in Berke's hands, the government's right would be conditioned on whether Berke claimed privilege in the papers. The papers sought to be withheld are not open to government inspection but for their being withheld by a fiduciary; they are not papers already determined to be available to the government independent of the privilege against self-incrimination.

[9] Ownership, without possession, of course, does not give rise to a claim of the privilege, for although the owner may watch with regret the giving up of his materials to the government by their possessor, the compulsion which underlies their surrender is not exercised against him and requires no incriminating disclosure, express or implicit, on his part—*he* need not choose among self-accusation, contempt, or perjury. The privilege prevents self-incrimination, not incrimination itself. *Johnson* v. *United States*, 228 U.S. 457, 33 S.Ct. 572, 57 L.Ed. 919 (1913) (Mr. Justice Holmes): ("A party is privileged from producing the evidence, but not from its production." Id. at 458, 33 S.Ct. at 572. "If the documentary confession comes

Possession of potentially incriminating documents is thus the necessary and sufficient condition of the privilege, for the compelled production, identification, and authentication of incriminating materials by the possessor will incriminate him, whether or not the documents are his.[10]

It is difficult to see how this conclusion could be affected by the fact that the papers were owned by another who had the right to demand their return. The owner's demand would not involve compulsion by the state, and compliance with it would not incriminate the possessor. The considerations upon which the right depends therefore would not apply, even though the documents might thereafter be obtained by the government from the owner. "[T]he sentiments which bar the *state* from requiring a person to deliver to it a self-incriminating document are logically unrelated to the fact that someone *else,* using methods and for reasons not giving rise to those same sentiments, can require the person to de-

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[9] (Continued)
to a third hand *alio intuitu,* as this did, the use of it in court does not compel the defendant to be a witness against himself." Id. at 459, 33 S.Ct. at 572. See also Ex Parte Fuller, 262 U.S. 91, 93—94, 43 S.Ct. 496, 67 L. Ed. 881 (1923); *Dier* v. *Banton,* 262 U.S. 147, 149-150, 43 S.Ct. 533, 67 L.Ed. 915 (1923); *Perlman* v. *United States,* 247 U.S. 7, 15, 38 S.Ct. 417, 62 L.Ed. 950 (1918); *Remmer* v. *United States,* 205 F.2d 277, 285 (9th Cir. 1953), rev'd on other grounds 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

[10] Application of House, 144 F.Supp. 95, 101 (N.D.Cal. 1956); Fahey, Testimonial Privilege of Accountants in Federal Tax Fraud Investigations, 17 Tax.L.Rev. 491, 504 (1962); Meltzer, Required Records, The McCarran Act, and the Privilege against Self-Incrimination, 18 U. Chi.L. Rev. 687, 706-08 (1951); 8 Wigmore, Evidence § 2264, at 379-80 (McNaughton rev. 1961). See also *United States* v. *Foster,* 16 A.F.T.R.2d 5121 (W.D.Tex. 1965); Application of Daniels, 140 F.Supp. 322, 327 n. 5 (S.D. N.Y.1956). See note 17.

liver up the document to that someone else." 8 Wigmore, Evidence § 2259b, at 360 (McNaughton rev. 1961).[11]

It has been suggested[12] that if the owner were served with a summons he would be required to retrieve the papers from the possessor for production in compliance with the summons;[13] that the possessor could neither refuse to return the papers to the owner nor prevent the owner from submitting the papers to the government on the ground that they would tend to incriminate the possessor; and that the government should be permitted to accomplish directly by serving the summons upon the possessor what it could in any event accomplish indirectly by serving the owner.

The suggestion overlooks the fact that if the owner is a natural person, as in our case, he might himself, after acquiring possession, assert the privilege and refuse to produce the papers.[14] Moreover, it misses the point to argue that since the government might obtain the papers by another means it should be permitted to compel the

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[11] See also Cohen, Accountants' Workpapers in Federal Tax Investigations, 21 Tax L.Rev. 183, 199 n. 52, 200 n. 53 (1966). It may be argued that since seizure by the state armed with a proper warrant does not involve compelled *self*-incrimination and since the decision in *Warden* v. *Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L Ed.2d 782 (1967), abolished the "mere evidence" rule, refusal to permit the government to obtain the documents sought here by its summons unduly exalts form. One of many answers to this contention is that the Fourth Amendment has its own set of protective limitations, including those of specificity and probable cause.

[12] See, e.g., Fahey, Testimonial Privilege of Accountants, 17 Tax L.Rev. 491, 504 (1962); Meltzer, Required Records, 18 U.Chi.L.Rev. 687, 707 (1951).

[13] The record indicates the the government served Berke with a summons. It does not appear whether any effort was made to enforce it.

[14] See note 8.

possessor to produce them over his claim of privilege[15]—that the government might obtain these documents without compelling Cohen to incriminate himself is hardly a justification for compelling Cohen to incriminate himself. We cannot ignore the dictates of the Fifth Amendment on the ground that it would be more convenient or efficient to do so.

[6] In a slight variation of its basic theme, the government argues that Berke's request to Cohen to return the papers rendered Cohen's possession "wrongful" and therefore insufficient to support a claim of privilege.[16]

There is authority that possession of incriminating documents is sufficient to support the privilege even though the possession is wrongfully acquired and the owner has requested that the documents be returned.[17]

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[15] Cf. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920): "But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."

[16] The government relies principally upon the pronouncement in *Deck* v. *United States,* 119 U.S.App.D.C. 240, 339 F.2d 739, 740-741 (1964), "that one who holds papers against the owner's demands for their return cannot resist production by claiming the privilege against self-incrimination." Compare *In re Fahey,* 300 F.2d 383 (6th Cir. 1961).

[17] Judge Learned Hand in *In re Grant,* 198 F. 708, 709 (S.D.N.Y.1912), aff'd 227 U.S. 74, 33 S.Ct. 190, 57 L.Ed 423 (1913), noted that in *Wilson* v. *United States,* 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911), the documents belonged to the corporation and the directors had demanded their return but the Supreme Court did not place its decision upon either ground, but rather upon the quasi-public character of the corporate books. Explaining why neither lack of title nor a demand to relinquish possession would be sufficient to deny the privilege, Judge Hand said:

> For instance, suppose that A., knowing that B. has papers which would incriminate him, gets wrongful

The logic of the privilege supports this view, for, as we have said, the exercise of governmental power which the privilege was intended to bar occurs whenever, without more, a person is compelled to identify, authenticate, and produce documents which may tend to incriminate him.

In any event, Cohen's possession cannot fairly be characterized as wrongful. Berke testified without contradiction that he considered all papers relating to his clients' affairs to be theirs to command, and that it has been his invariable practice to deliver such papers to the client whenever requested. When Beason asked Berke to request the return of the papers, Berke simply reported the fact to Cohen, saying, "Mr. Beason has asked me to

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[17] (Continued)

possession of them from B., whom they do not incriminate. If B. is content, and leaves A. in possession, I do not understand that it would be any answer whatever for A. to say: "You cannot keep these back, because you came by them wrongfully, or at least you have no right to them now." All the law considers is whether A. has got possession in fact, and whether the documents actually will tend to incriminate him. To get them in evidence the law would have to force him to bring them out of a possession which is good enough against any one but B. Certainly, I can find nothing in the books which suggests such a distinction, and it contradicts the whole history of the matter. For the privilege runs along side by side with the power to compel production, and that power depends only upon serving the actual possessor. There are cases to be sure where one having custody is not required to produce, but it is only because his custody is so subordinate as not to justify his meddling with documents even to bring them to court. Certainly, a full possessor of the documents is always subject to subpoena, whether his possession is lawful or unlawful, and regardless of ownership.

See also Cohen, Federal Tax Investigations, 21 Tax L.Rev. 183, 199 n. 52 (1966).

ask you to return the files that you took from our office."[18] This would appear to have been no more than a transmittal by Berke to Cohen of Beason's request; at least it was scarcely a clear demand by Berke that Cohen submit to Berke's superior right. Berke subsequently wrote to Beason, "We have no interest in or right to possession of the records which we furnished Mr. Cohen and therefore have no right or obligation to ask him to return them to us."[19]

It is conceded that Cohen acquired the documents from Berke with Berke's full consent. On this record it cannot be said that Cohen's rightful possession was terminated by the subsequent assertion of an owner's superior right, assuming that right lay with Berke.

II

The government's second contention is that Cohen should be denied the privilege against self-incrimination as to the accountant's work papers because these documents were prepared by the accountant for the latter's own use and therefore "did not constitute the personal private papers of the privilege-claimant" to which alone the privilege should apply. The "normal character and nature of an accountant's work papers as third-party documents, vis-a-vis the client" was not changed, the government's contention continues, by the "eleventh hour" transfer of these documents to Cohen.

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[18] The district court found that Berke took this step "only because of Beason's request. Berke did not make the request because he wanted the records back. The contrary is true. At all times, Berke disclaimed any property or possessory right to the records." 250 F.Supp. at 473.

[19] 250 F.Supp. at 473 n. 1, quoting a letter from Berke to Beason dated September 29, 1964. This is the date upon which the summons was served upon Cohen. However, the concluding paragraph of the letter, not quoted by the district court, indicates that the letter was confirmatory of a telephone conversation between Berke and Beason on September 2, 1964.

If documents are incriminating, compelled production by the possessor would seem prohibited by the Fifth Amendment for reasons already discussed, without regard to any other characteristic the documents may possess.

[7] It is true, as the government points out, that *Hale* v. *Henkel,* 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), and cases which follow it, including *United States* v. *White,* 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), establish an exception applicable to the records of a corporation or other impersonal organization. It is also settled that the production of such records may be compelled even though a natural individual claiming privilege has acquired both possession and title. *Grant* v. *United States,* 227 U.S. 74, 75, 33 S.Ct. 190, 57 L.Ed. 423 (1913); *Wheeler* v. *United States,* 226 U.S. 478, 33 S.Ct. 158, 57 L.Ed. 309 (1912).

The latter rule is explained by the rationale of the exception itself. As we have noted, the public interest in effective governmental regulation of impersonal organizations underlies the exception. This interest does not end with the transfer of possession or ownership of an organization's records to a natural person. A claim of privilege by a transferee cannot be permitted to bar government inspection of such records any more than could a claim of personal privilege by an officer-custodian. There is no similar public policy requiring government access to the work papers of an individual accountant which would require barring a claim of privilege by another individual to whom such papers have been transferred.

The government argues that the purpose of the privilege is to prevent the prosecutor from invading the claimant's "privacies of life" *(Boyd* v. *United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed 746 (1886)), and to force the government "to search for independent evidence" of the claimant's guilt *(United States* v. *White, supra,* 322 U.S. at 698, 64 S.Ct. 1248). Papers which originated with the accountant and were created by him for his own purposes are not embraced (the argument continues) within

the "privacies" of Cohen's life, but on the contrary, constitute an independent source of evidence of Cohen's offense. The government urges that Cohen should not be permitted to extend the area covered by the privilege or to deny the government access to independent evidence by gathering the documents into his possession after being advised of the government's interest.

Although the summons issued in this case was sufficiently broad to include books and records which Cohen had delivered to the accountant for his use in the preparation of Cohen's tax returns, the government concedes that the privilege was not lost as to these books and records simply because Cohen reclaimed them so shortly before the summons was served. Thus the government's argument rests ultimately upon the contention that the documents were not sufficiently personal or private in character, rather than upon the contention that the time and manner of Cohen's acquisition of them undermined his claim of privilege.

APPENDIX C

Wilfred W. BAUER, Special Agent,
Internal Revenue Service, Petitioner,
v.
Lloyd ORSER, Respondent.
Civ. No. 743.
United States District Court
D. North Dakota,
Southwestern Division.
Aug. 31, 1966.

MEMORANDUM AND ORDER

REGISTER, Chief Judge.

This proceeding was instituted by Petitioner for the enforcement of Internal Revenue summonses, under the authority of Section 7604, Title 26, U.S.C.A. Petitioner is a Special Agent of the Intelligence Division, Internal Revenue Service, and as such is authorized to issue and serve Internal Revenue summons by virtue of the provisions of Sections 7602 and 7603, Title 26, U.S.C.A. Respondent is a Certified Public Accountant, practicing his profession in Bismarck, North Dakota. On January 22, 1965, the two summonses here involved were issued by Petitioner and by him served upon Respondent during the course of an official investigation Petitioner was then conducting into the matter of the federal income tax liability of Kenneth W. Peterson and Lois A. Peterson, Carson, North Dakota, for the calendar years 1960 through 1963, inclusive. The summonses were issued and served in aid of that investigation.

Hearing on the petition for enforcement was had before this Court on March 24, 1966. Transcript of the testimony adduced at the hearing was subsequently prepared and filed, and the matter has been fully briefed by the parties. The Court has carefully re-examined the evidence—including the testimony and evidence—and has considered the briefs, and finds and concludes as is hereinafter stated. It should be noted that the essential facts are undisputed.

Robert Vogel is an attorney at law practicing his profession in Mandan, North Dakota. He is the senior partner of the firm Vogel and Bair. He is a general practitioner, doing very little tax work and no accounting. In June, 1964, Mr. Vogel was consulted by Kenneth W. Peterson and Lois A. Peterson (hereinafter referred to as Petersons) with reference to their United States income taxes for the years 1960 to 1963, inclusive. The uncontradicted testimony of Vogel is that, after being retained to represent the Petersons in June, 1964, "I told Mr. Orser (Respondent) that I had some clients that had come to me on a tax matter and that I didn't understand accounting well enough to do the accounting angle myself and I wanted to retain Mr. Orser to assist me by doing accounting work for me so that I could properly advise the Petersons, and he said that he would do so, and I told him I would send the people over to see him, and I did." This testimony is corroborated, in substance, by Orser. It is patently clear that, prior to the time Petersons called to see Orser, Orser had been employed by Vogel, on behalf of his firm, for the stated purpose; namely, to assist Vogel "* * * by doing accounting matters so that I (Vogel) could properly advise the Petersons as to their legal rights." It is further established by the undisputed evidence that Vogel gave to Orser special instructions regarding the nature of the services to be performed by Orser, and that he (Vogel) gave to the Petersons instructions concerning the relationship of the taxpayers with Orser—that is, to consider that their (Petersons) disclosures to Orser were confidential in nature, the same as though made to their lawyer, Vogel.

Orser was informed, at the time of his employment by Vogel, that Petersons would bring their records to Orser's office, and he was also instructed by Vogel that when he (Orser) was through with his examination of the records he was to make his report to Vogel, and that Vogel would then decide whether or not amended returns for the years involved should be prepared and filed. Petersons did thereafter deliver their records to Orser.

During the period of Orser's employment by Vogel, Petersons and Orser conferred and communicated with each other, Vogel and Orser conferred from time to time, and on occasions all three parties conferred. Upon completion of Orser's examination and his report, Vogel concluded that amended returns for the years 1960 through 1963 should be prepared and filed. Such amended returns were thereupon prepared by Orser, delivered to Vogel (pursuant to Vogel's instructions), and subsequently filed with the Director of Internal Revenue at Fargo, North Dakota, in November, 1964. Throughout the time Orser was performing the service requested by Vogel, he was in possession of the records belonging to Petersons'. Such records consisted of cancelled checks, bank deposit slips, a ledger book listing the checks, copies of Petersons' original tax returns, and the deposit books and cancelled checks and check stubs of Petersons' trust account, and were all referred to by Orser during the course of his preparing the amended returns. Prior to the time of the service of the summonses here involved, Orser had prepared workpapers which in substance summarized for each year the information he had gleaned from Petersons' records, and also included copies of correspondence between Orser and Petersons—and notes of telephone conversations—whereby Orser had requested from the Petersons certain explanatory information. Both Vogel and Orser considered that the workpapers, summary sheets, notes, etc., made and prepared by Orser during the performance of his duties of employment, were and are the property of the firm of Vogel and Bair, the employer.

Each of the original returns for the subject years was timely filed; neither Vogel nor Orser had been involved in the preparation or filing of those original returns. In fact, Orser had never seen the Petersons, did not know them, and had done no work for them until they appeared at his office pursuant to the arrangement made by Vogel. The amended returns were each executed on November 12, 1964, and, as hereinbefore stated, filed with the Internal Revenue Service on November 19, 1964.

On December 8, 1964, Petitioner sent a letter to the taxpayers, requesting that they appear in his office. This was Petersons' first notice that Petitioner was involved in their tax matters. Vogel responded to that letter on December 9, informing Petitioner that he, Vogel, was representing the Petersons. Additionally, on December 8, Petitioner had his first contact with Orser, when he and Agent Nelson called at Orser's office. At that time Petitioner got a brief glance at some of Orser's workpapers, but did not examine them. Also, at that time, all of the Petersons' records were in Orser's possession; the amended returns, as heretofore stated, had previously been filed. During this visit, Orser was served with a summons (not the summons here involved), by Petitioner, directing Orser to appear at Petitioner's office on December 21, 1964, and to bring with him certain described records belonging to Petersons. On that date Orser did appear at said office with the requested documents and with his attorney (Bruce Bair, Vogel's partner), but refused to produce the papers on the advice of his counsel, who claimed the attorney-client privilege would be violated by such production, and on the further ground of Peterson's self-incrimination.

After Vogel had informed Petitioner by letter on December 9 that he (Vogel) represented Petersons, Petitioner responded "* * * that their practice was that they would deal with the taxpayer until such time as an attorney or other persons filed a power-of-attorney with them, and, therefore, he would continue to deal directly with the Petersons." Thereafter, in January, 1965, Vogel did file with the Internal Revenue Service several powers of attorney—one from each of the Petersons for each of the years involved.

On December 31, 1964, Orser billed the firm of Vogel and Bair for all of his services here involved. The fee charged was a "* * * flat fee covering everything," and payment was made by the firm's check on January 21, 1965. At the time of Orser's employment by Vogel there was no discussion regarding the fee, since Vogel was

familiar with Orser's fee schedule and knew the charge would be based upon time spent on the job. Orser had previously done work for the firm of Vogel and Bair.

On January 22, 1965, Petitioner served upon Orser the two summonses here involved, whereby Respondent was required to appear before Petitioner at his office on February 2, 1965, and to bring with him certain described documents. One summons required Orser to bring with him

> "All books, records, papers, memoranda, or other documents of Kenneth W. Peterson and Lois A. Peterson in your possession or subject to your control for use in preparing their 1960, 1961, 1962, and 1963 original and amended federal income tax returns,"

and the second summons required Respondent to produce

> "All of Paul McCann and Company and Lloyd Orser's workpapers in your possession or subject to your control used in the preparation of the 1960, 1961, 1962, and 1963 original and amended federal income tax returns of Kenneth W. Peterson and Lois A. Peterson."

Vogel thereupon wrote Petitioner and informed him that he could not be present on February 2 due to a scheduled court appearance, and requested a later date be substituted. In reply, Vogel was informed that Petitioner would be in his office on February 1, on which date Orser and Vogel appeared. Orser then had in his possession a box containing all of the enumerated records and documents but refused to produce them for the Petitioner, and based his refusal upon the advice of his counsel. At that time Vogel informed the Petitioner that "• • • I would direct Mr. Orser not to produce any of the documents described for the reason that I considered any such production would be a violation of the attorney-client privilege, since I was the attorney for the Petersons and these were their papers and I had hired Mr. Orser to assist me and, therefore, he was working as an assistant

to an attorney in the case, and I felt that the attorney-client privilege applied. Also, on behalf of the Petersons, I claimed the privilege against self-incrimination for the reason that they were being asked to incriminate themselves through their attorney and a man working for their attorney, and * * *".

In November or December, 1965, Petersons called at Orser's office, at which time, pursuant to Petersons' request, he delivered to them the complete Peterson file, including all of the records and documents hereinbefore referred to. Such delivery was made by Orser only after he secured instructions and legal advice from Vogel. At the time of the delivery Orser had no knowledge of the filing of the within Petition for enforcement. Throughout all the pertinent times involved in these proceedings, Vogel (or Vogel and Bair) has been and is legal counsel for the Respondent as well as for the Petersons.

This enforcement proceeding was institued by the filing of the within Petition on October 4, 1965. In addition to the oral testimony adduced at the hearing, there were received in evidence Petitioner's Exhibits 1 and 2 (being the two summonses dated and served on January 22, 1965) and Respondent's Exhibit A. Exhibit A is a letter dated March 23, 1966, signed by the Petersons and directed to Vogel. The body of said letter is as follows:

> "In connection with the tax matter we have discussed, we hereby claim the privilege against self incrimination as to any and all records of ours and working papers worked on by the accountant, Lloyd Orser, whom you retained in connection with a matter we retained you, and we instruct you, on our behalf, to claim the privilege as to self incrimination on any and all occasions when any attempt might be made by the government to obtain any of such records or working papers.
>
> "We further instruct you, in our behalf, to assert the attorney-client privilege as to any such attempts

to obtain access to any such records or working papers or to obtain any testimony as to our affairs from either you or Mr. Orser."

The initial inquiry before the Court is whether any of the documents or papers described in the summonses are exempt from production by reason of being within the attorney-client privilege. Exhibit 1 requires the production of books, records, papers, memoranda and other documents belonging to Petersons and in the possession of Respondent, and Exhibit 2 calls for the production of the workpapers prepared by Respondent.

[1] The Court is satisfied—and so finds—that the workpapers prepared by Respondent (described in Exhibit 2), under the facts established in this proceeding, are included within the attorney-client privilege.

It is undisputed that Respondent was employed by Vogel to perform certain specialized and expert services which Vogel was not qualified to perform and which were essential in order that Vogel give the proper legal advice and render proper legal service to his clients, the Petersons. During all the pertinent times Respondent was the agent and employee of Vogel; he submitted his bill to Vogel and Bair, and was paid by that firm. Petersons were assured by Vogel, prior to Respondent's employment, that their communications to Respondent would be confidential—the same as though made to Vogel. Having in mind the facts as hereinbefore stated, it appears that, in this matter, Respondent is in the same position as an accountant who is a regular employee of a law firm engaged in legal work for which such accounting assistance is necessary to the lawyers in the effective performance of their legal services.

The record establishes, to the satisfaction of the Court, that Respondent's services were performed as an employee of Vogel and Bair; that the workpapers are the property of Vogel and Bair; that such workpapers contain confidential information secured from the Petersons

or their legal counsel; that Respondent's function and employment was to aid Vogel so that he could provide effective and proper legal advice concerning the matters about which he or his firm had been retained by Petersons; and that such information was given by the Petersons pursuant to Vogel's direction and with the understanding and assurance that the same would be kept in confidence. See: *United States* v. *Kovel,* 2 Cir., 296 F.2d 918; *United States* v. *Judson,* 9 Cir., 322 F.2d 460; and VIII Wigmore on Evidence, Sections 2292 and 2301.

In his brief counsel for Petitioner cites, among others, the case of *Bouschor* v. *United States,* 8 Cir., 316 F.2d 451, in support of his argument. Factually, *Bouschor* is so dissimilar to the instant case as to require little comment. In *Bouschor* the accountants had been employed by the *taxpayers* prior to their retaining a lawyer; the accountant's workpapers were in existence *prior* to the existence of an attorney-client relationship between Bouschor and the taxpayer; there was no substantial evidence—and no finding—that the accountant's workpapers were the property of the taxpayer or of Bouschor (the taxpayer's lawyer); and it clearly appeared that the workpapers were not prepared in confidence.

In *Deck et al.* v. *United States et al.,* D.C.Cir., 339 F.2d 739, also cited by Petitioner's counsel, the Court of Appeals affirmed the trial court's finding that the accountant's workpapers there involved were the property of the accountant, and that the taxpayer (in temporary possession of such papers, although demand therefor had been made by the accountant-owner prior to the issuance of the Internal Revenue summons) who was holding the papers against the owner's demand for their return could not resist production by claiming the privilege against self-incrimination. No such factual situation exists in the instant case.

In order that there be no misunderstanding, the Court will state that, in its opinion, the question presented as number 1 in Petitioner's memorandum, to-wit:

> "Are communications made by taxpayers to an accountant which are intended to be disclosed to the Internal Revenue Service, and are in fact so disclosed, protected by an attorney-client privilege as confidential communications?"

is not raised by the facts as disclosed by the evidence and is not before the Court.

[2] Exhibit 1 calls for the production of Petersons' records which had been delivered to Respondent. Some of these items had been negotiable instruments in commerce; some were copies of bank and financial records. All were pre-existing documents and financial records *not* prepared by taxpayers in confidence, or for the purpose of communicating with their lawyer in confidence. These records and documents do not constitute privileged communications within the attorney-client privilege. See: *United States* v. *Judson, supra*; *Colton et al.* v. *United States,* 2 Cir., 306 F.2d 633; and *Falsone* v. *United States,* 5 Cir., 205 F.2d 734, 739.

The question remains—raised and briefed by the parties —whether the taxpayers' Fifth Amendment privilege against self-incrimination has been properly asserted and presented to the Court, with regard to the records and documents described in Exhibit 1.

Petitioner contends that "The privilege against self-incrimination embodied in the fifth amendment is personal to the holder. Therefore, it cannot be asserted by a stranger to vitiate his responsibility to obey the mandate of an internal revenue summons." Further, that

> "It may well be that the taxpayers could have petitioned a court to enjoin the accountant from complying with the summons, *Reisman* v. *Caplin,* 375 U.S. 440 [84 S.Ct. 508, 11 L.Ed.2d 459]; but they did not elect to do so. Nor have the taxpayers intervened in this proceeding to raise any defense they may have to bar inspection of data clearly relevant to the pending inquiry.

"Consequently, as to Exhibit 2, (sic) there is presented for consideration under the present posture of this action the sole question of whether in this Circuit a respondent may raise a purported Fifth Amendment privilege of another to avoid obedience to the mandate of a Congressional Statute, Section 7602, supra.

"Under the holding in *Bouschor* v. *United States,* 316 F.2d 451, 458, such a defense is not available.

> • • • the guarantee against self-incrimination has long been characterized as a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. *Hale* v. *Henkel,* 1906, 201 U.S. 43, 69-70 [26 S.Ct. 370, 50 L.Ed. 652]; *McAlister* v. *Henkel,* 1906, 201 U.S. 90, 91 [26 S.Ct. 385, 50 L.Ed. 671]; *United States* v. *White,* 1944, 322 U.S. 694, 704 [64 S.Ct. 1248, 88 L.Ed. 1542]; *In re Fahey* [6 Cir.], supra, p. 385 of 300 F.2d [383]. This, it seems to us, is determinative of the Fifth Amendment argument."

That part of Petitioner's brief which concerns the law relating to the self-incrimination aspect of this proceeding has been quoted in substantially its entirety, for the reason that it is apparent therefrom that such discussion is confined to very narrow limits and does not cover the situation which remains to be considered, as disclosed by the record.

It appears that Petitioner assumes or contends that the claim of privilege against self-incrimination must be asserted only in person—that is, by physical presence and voice—in a proceeding or action in which such person is a party or witness, and that a determination of this question by the Court which is favorable to the Petitioner is determinative of the merits. No comment has been made concerning the fact that several months prior to the hearing, all of the records and documents described in

Exhibit 1 had been delivered, by the Respondent, to the legal owners thereof. It may be that such omission is due to the fact that the Court was assured by Vogel, at the hearing, that Orser would comply with any order that the Court might enter herein.

Acknowledging *Bouschor, supra,* Respondent challenges the correctness thereof—concerning the point under discussion—and cites *Colton, supra; United States* v. *Judson, supra*; Application of House, 9 Cir., 144 F.Supp. 95; and VIII Wigmore on Evidence, Section 2307, in support of his contention that an attorney can assert the claim of privilege against self-incrimination on behalf of his client. The facts in the instant case are somewhat unusual in that not only did the taxpayers' lawyer raise and claim the taxpayers' privilege against self-incrimination (both as to the workpapers prepared by Orser, which are the property of the lawyer, and as to the pre-existing documents and records of the taxpayers), but the lawyer had been expressly directed and authorized by the taxpayers to do so. (See Respondent's Exhibit A.) In addition, the taxpayers had executed and delivered to their lawyer powers of attorney appointing him their attorney-in-fact to take such action.

[3] While the Court recognizes there is authority to the contrary (see, *e.g., Brody* v. *United States,* 1 Cir., 243 F.2d 378), *Bouschor* is the law in this Circuit and this Court is bound thereby. It does not necessarily follow, however, that the Petitioner is entitled to the relief he seeks.

At the time of service of the summonses with which we are concerned (January 22, 1965), Respondent was in possession of the records and documents belonging to Petersons and the workpapers prepared by him in the course of his employment by Vogel. The enforcement petition was filed on October 4, 1965—more than eight months after the appearance of Respondent and his counsel before Petitioner on February 1, 1965. During that period of time Respondent had no legal right to

retain the described documents and records; he had no property right therein, or right of possession, except such as continued by virtue of his employment by Vogel. When Petersons called at Respondent's office and asked for the entire file (November or December, 1965), they were legally entitled to immediate possession of their own records and documents, and Respondent had been directed by Vogel to deliver the workpapers (which were legally the property of Vogel) to the Petersons. At that time Respondent had no basis whatever to refuse to comply with Petersons' request and Vogel's directive, since Vogel not only was Respondent's employer, and legal counsel for Petersons, but also Respondent's lawyer. Further, at the time of delivery of the file to Petersons, Respondent was unaware of any action taken by the Internal Revenue Service which would have constituted a basis for his refusing such delivery, and which would have protected him had he made such refusal. On March 24, 1966—the date of hearing—Respondent was in the position of being unable to comply with the summonses, an inability (as shown by the record) which resulted not from any wilful or improper act or conduct on his part, but from following the advice of his lawyer, the directive of his employer, and the demand of the Petersons in asserting their legal rights. During the hearing, the taxpayers presented to the Court—through their retained counsel, Vogel—Respondent's Exhibit A, a document in which they affirmatively and expressly claimed their constitutional privilege against self-incrimination. The genuineness of their signatures is not disputed. While it is true that methods could have been followed whereby the taxpayers—being the parties affected by an ordered disclosure—could have intervened or become parties to the proceeding (Reisman, supra, 375 U.S. at p. 445, 84 S.Ct. 508) for the purpose of personally asserting their rights, it appears that the method employed in this case is, considering the facts and circumstances, relatively unimportant and that, in the protection of such claimed privilege, the Court should and must be primarily concerned with the substance thereof.

By virtue of Exhibit A, the Court has had its attention called to the fact that Petersons have asserted—and do assert—their constitutionally guaranteed privilege against self-incrimination, with regard to the production of subject records and documents. See: Brody, supra, 243 F.2d at page 387.

[4] It has been held that "* * * the person subpoenaed may not decline to testify or to produce a record in his possession because of possible incrimination of a third person. (Citations.) Neither may the owner raise his privilege against self-incrimination, under either amendment, to prevent the production of his private records in the possession of third persons. (Citations.)" *United States* v. *Onassis et al.*, D.C., S.D.N.Y., 133 F.Supp. 327, 330. However, in this proceeding, the documents sought are in the possession of their lawful owners, and not in the possession of the Respondent or any other "third person," and there presently exists no way in which Respondent can obtain those documents from their owners, lawfully, against the owner's consent. Any order of this Court which would purport to require compliance by the Respondent with the subject summons (Exhibit 1) would require the Respondent to secure possession of the described documents from the legal owners and possessors thereof for a purpose in direct conflict with the privilege against self-incrimination heretofore asserted and claimed by the taxpayers. In the opinion of this Court, based upon the facts as disclosed by the record herein, such an Order would be not only unenforceable but improper.

For the reasons stated, the petition for enforcement of Internal Revenue summons is, in all things, denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Tuesday, September 17, 1968

Before
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA and RICHARD C. ANDERSON, Special Agent, Internal Revenue Service, *Petitioners-Appellees,* v. MICHAEL ZATKUTANSKY and ARTHUR M. JOHNSTON also known as ARTHUR M. JOHNSON, *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

It Is Ordered by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

(Judge Schnackenberg cast his vote on September 12.)

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA and RICHARD C. ANDERSON, Special Agent, Internal Revenue Service, *Petitioners-Appellees,* v. MICHAEL ZATKUTANSKY and ARTHUR M. JOHNSTON also known as ARTHUR M. JOHNSON, *Respondents-Appellants.*	No. 16790

MOTION

Now come the respondents-appellants by Bernard H. Sokol, their counsel, and move that the mandate in this cause by stayed thirty days so that respondents-appellants may file their petition for certiorari in the Supreme Court of the United States.

In support of such motion the following is submitted to this Honorable Court:

1. Respondents-appellants believe that there is a conflict in the circuits on the question raised herein and that it is necessary that this conflict be thoroughly briefed.

2. There is no good reason to accelerate the proceedings.

3. Fairness would suggest that counsel for respondents-appellants be given the conventional and usual time within which to perfect the petition for certiorari. An extension or enlargement of the period provided by the

rules will not be sought, but the thirty days is absolutely necessary in order to properly prepare the briefs in this matter.

4. This motion is not made for purpose of delay.

.....
Bernard H. Sokol
Attorney for Respondents-Appellants

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Motion is made on counsel for Petitioners-Appellees on this 19th day of September, 1968, by mailing a copy thereof in an envelope with postage prepaid, properly addressed to him as follows:

Mitchell Rogovin
Assistant Attorney General
Tax Division, Department of Justice
Washington, D. C.

.....
Bernard H. Sokol

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Friday, September 20, 1968

Before
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA and RICHARD C. ANDERSON, Special Agent, Internal Revenue Service, *Petitioners-Appellees,* v. MICHAEL ZATKUTANSKY and ARTHUR M. JOHNSTON also known as ARTHUR M. JOHNSON, *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 16790

On consideration of the motion of counsel for respondents-appellants,

It Is Ordered that the issuance of the mandate of this Court be further stayed for thirty (30) days in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

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326-243—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 693

MICHAEL ZAKUTANSKY AND ARTHUR M. JOHNSTON,
PETITIONERS

v.

UNITED STATES OF AMERICA AND RICHARD C. ANDERSEN,
SPECIAL AGENT, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is not yet officially reported. The district court's opinion, which is set out in the opinion of the court of appeals, is reported at 278 F. Supp. 682.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1968 (Pet. App. 8a), and a petition for rehearing was denied on September 17, 1968 (Pet. App. 35a). The petition for a writ of certiorari was

filed on October 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether enforcement of an Internal Revenue summons directing an accountant to produce his workpapers violated the privilege against self-incrimination asserted by the taxpayer whose returns were under investigation.

STATUTES INVOLVED

The Internal Revenue Code of 1954 provides in pertinent part:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place

named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*--If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

(25 U.S.C. 7604.)

STATEMENT

The United States brought this action to enforce compliance with four Internal Revenue summonses, issued during an investigation of petitioner Johnston's tax liabilities for the years 1960 through 1965 (R. 1–16).[1] All four summonses sought production of the workpapers of petitioner Zakutansky, the accountant who had prepared Johnston's returns (R. 7–14). The first three were addressed to Zakutansky, the fourth to Johnston. In answers to the government's petition for enforcement, both petitioners alleged that the work-

[1] "R." refers to the printed appendix in the court of appeals.

papers were the property of the taxpayer, Johnston, who claimed that they would incriminate him (R. 17–26). After a hearing, the district court found that the workpapers were the property of Zakutansky, and that Johnston did not have rightful possession of them. Zakutansky was ordered to produce them and to testify in compliance with the summonses (R. 100–111).[2] The court of appeals based its affirmance on its express agreement with the district court's finding of fact that the papers sought were the accountant's work product and had been transferred to the taxpayer's custody only to thwart the investigation. (Pet. App. 6a.)

At the outset of the hearing it was made clear that the only documents sought by the government were materials properly classifiable as Zakutansky's workpapers (R. 27–39).[3] The agents testified that, when they interviewed the accountant on May 11, 1966, he admitted that he had in his possession workpapers which he considered his own property, and they thereupon served him with a summons requesting production (R. 7–8, 41–43, 59–60). Although he appeared as directed on May 23, with counsel, he refused to disclose the papers, asking further time to consider the

---

[2] At the request of petitioners, the workpapers were examined by the district court and then placed under seal for inclusion in the record on appeal (R. 28–39, 72–75, 103, 108, 117–119).

[3] The first summons to Zakutansky had directed production of some of taxpayer Johnston's records as well as Zakutansky's workpapers (R. 7), but the other three refer only to the workpapers (R. 9, 11, 13). The agent made the change upon the advice of government attorneys (R. 58).

legal aspects of the matter (R. 42–43). On June 28, a second summons was served upon the accountant,[4] who appeared with counsel on July 8, but again refused compliance (R. 9–10, 43–45).

In considering his next step, the special agent discovered that he had mistakenly dated the second summons as issued on "July 28, 1966," instead of the actual date of issuance, June 28, 1966 (R. 45). On July 20, the agent called the accountant's attorney to advise him of the error and to ask what position he would take.[5] The attorney asked time to consider, but called back on July 25 to say that he would have no comment on the mistake (R. 45–46). The agent immediately issued a third summons to the accountant, identical to the second, with a return date of August 4 (R. 11–12, 46). The accountant appeared, with counsel, on the date directed, but refused to testify and said that he could not produce the workpapers since he had turned them over to his client, Johnston, on July 22 (R. 46–47). After further consideration and consultation with government attorneys, the agent on December 30, 1966, issued a fourth summons for production of the workpapers, this time directed to the taxpayer, Johnston (R. 47–48). Johnston appeared with counsel, admitted that he had the papers given to him by his

[4] As noted in the previous footnote, on the advice of government counsel, this second summons omitted any request for documents which were the property of the taxpayer.

[5] Contrary to the statement of the district court (R. 102), the accountant had not called attention to the erroneous date when he appeared on July 8 in response to the second summons (R. 44).

accountant, but refused to produce them on the ground that they were not workpapers and were his own property (R. 13–14, 48–49, 94–99).

At the hearing, the accountant testified for the defense that he had always regarded the papers as the taxpayer's property, and that he had turned them over to him, at the latter's request, after a summons had been issued for them (R. 61–70, 72–91). The taxpayer did not testify.

The district court, after careful consideration of the documents in question and the testimony about them, found that the papers were the accountant's workpapers, not the taxpayer's property (R. 72–76, 103–104). The court also found that "the transfer of the papers was a mere attempt to thwart the Government investigation" (R. 110), and that it did not give the taxpayer rightful possession of the papers (R. 110–111). The court concluded that in this context the taxpayer was not entitled to assert his privilege against self-incrimination in opposing enforcement of the summonses directed against his accountant (R. 104). Accepting the district court's findings of fact, the court of appeals affirmed (Pet. App. 8a).

ARGUMENT

We are not quite certain on what theory petitioners invoke the taxpayer's privilege against self-incrimination. We shall therefore deal, in turn, with the three possible contentions that may underlie their claim: (1) that the taxpayer was entitled to resist compliance with the summons because he owned the workpapers, or (2) because he had rightful pos-

session of them, or (3) because mere physical control over them was sufficient.

1. Petitioners' formulation of the questions presented in this Court (Pet. 2) and their statement of the facts (Pet. 4–6) indicate that their principal reliance is upon the defense alleged in the district court, *i.e.*, that the documents involved are the property of the taxpayer (R. 17–26, 61–99). That factual contention is, however, asserted, and not argued. It is also contrary to the concurrent findings of the courts below and thus not appropriate for re-examination by this Court. *Berenyi* v. *District Director,* 385 U.S. 630, 635–636. In any event, there was more than ample evidence to support the findings that the documents were the accountant's workpapers and that they belonged to him (R. 103–104, 105–106, 108–110).

2. Petitioners now contend (Pet. 7–8), in reliance upon *United States* v. *Cohen,* 250 F. Supp. 472 (D. Nev.), affirmed, 388 F. 2d 464 (C.A. 9) (Pet. App. 9a–21a), that the courts below erred in holding that, because the taxpayer in this case never obtained rightful possession of the workpapers, he could not refuse to produce them on the ground of self-incrimination. But the *Cohen* case is readily distinguishable. There, the trial judge, giving credit to the accountant's testimony that he always gave up his workpapers upon a taxpayer's request and that he was unaware of the Internal Revenue investigation at the time he transferred the papers to the taxpayer, found that the transfer had been made in good faith and that the taxpayer there had "rightful and indefinite possession in a purely personal capacity" (Pet. App. 12a, n.6). Here, on the con-

trary, where it is obvious that the accountant was well aware of the investigation and had been served with several summonses, the trial judge refused, as was within his province as trier of fact, to believe the accountant's altered contention—contrary to what he had told the investigating agents— that the papers belonged to the taxpayer. Rather, the trial judge found as a fact that the transfer was not in good faith, but was "a mere attempt to thwart the Government investigation" (Pet. App. 8a; R. 110). The court of appeals then agreed that it was "inescapable" that the papers being sought "were not in the unlimited and rightful possession of the taxpayer" (Pet. App. 8a). Whatever may be thought of the accuracy of the findings of fact in *Cohen,* the two cases are quite compatible on the underlying legal question involved. Indeed, the courts below expressly agreed with the proposition that *Cohen* stands for (Pet. App. 4a, 6a): that one who has rightful possession of a document may properly rely on his privilege against self-incrimination to resist an administrative summons for its production. The difference between the two cases is one of fact, not of law.

3. Petitioners quote (Pet. 7–8) a dictum in the *Cohen* opinion which refers to authority for the proposition that mere possession, whether rightful or not, provides sufficient basis for the invocation of the privilege. But it is clear from the very passage quoted that the actual *holding* in *Cohen* rests upon a finding of rightful possession. Moreover, the dictum is contrary to a long line of authorities. In *Boyd* v. *United States,* 116 U.S. 616 (1886), this Court drew

a sharp distinction between a man's private books and papers, which he cannot be required to produce, and other documents which he has in his possession, though not rightfully so. "The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not." 116 U.S. at 623–624. See, also, *Deck* v. *United States,* 339 F. 2d 739 (C.A.D.C.), certiorari denied, 379 U.S. 967 (1965); *In re Fahey,* 300 F.2d 383 (C.A. 6, 1961); *United States* v. *Pizzo,* 260 F. Supp. 216 (S.D. N.Y., 1966); *United States* v. *Boccuto,* 175 F. Supp. 886 (D. N.J., 1959), appeal dismissed, 274 F. 2d 860 (C.A. 3, 1959); *Application of House,* 144 F. Supp. 95, 101 (N.D. Cal., 1956); *Application of Daniels,* 140 F. Supp. 322, 327 (S.D. N.Y., 1956). There is abundant evidence in the record to support the trial judge's finding that the taxpayer's possession of the workpapers was simply an attempt to frustrate the investigation of his income tax returns.[6] The law will not tolerate such "shifts and subterfuges." *United States* v. *Bryan,* 339 U.S. 323, 334; *Loubriel* v. *United States,* 9 F. 2d 807, 808 (C.A. 2, 1926).[7]

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[6] When the papers were transferred on July 22, 1966, petitioners were well aware that the second summons was outstanding (*supra*, p. 5). The mistake in the date obviously caused them no prejudice. Cf. *Lucas* v. *United States*, 188 F. 2d 627 (C.A. D.C.).

[7] Petitioners' reliance (Pet. 9) upon *Bauer* v. *Orser*, 258 F. Supp. 338 (D. N.D.) (Pet. App. 22a–34a), is misplaced. Under the peculiar circumstances of that case, the workpapers involved had never belonged to the accountant. 258 F. Supp. at

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

NOVEMBER 1968.

340, 344–345 (Pet. App. 24a, 32a–33a). Furthermore, when the accountant transferred the papers to their owner he was unaware that the government had just recently taken steps to enforce a summons served on him almost a year previously. 258 F. Supp. at 341–342 (Pet. App. 26a–27a).

U.S. GOVERNMENT PRINTING OFFICE: 1968